

Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
3 Point Media - Salt Lake City, LLC)	File No. EB-06-IH-2074
)	NAL/Acct. No. 200832080011
Licensee of Station KHTB(FM))	Facility ID No. 6545
Provo, Utah)	FRN No. 0010028835
)	
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 14, 2007

Released: December 17, 2007

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”) and Section 1.80 of the Commission’s rules,¹ we find that 3 Point Media – Salt Lake City, LLC (“3 Point Media”), licensee of Station KHTB(FM), Provo, Utah, broadcast a telephone conversation without first informing a party to the conversation of its intention to do so, in apparent willful violation of Section 73.1206 of the Commission’s rules.² Based upon our review of the facts, we find, pursuant to Section 503(b) of the Act, that 3 Point Media is apparently liable for a forfeiture in the amount of \$4,000.

II. BACKGROUND

2. The Commission received a complaint alleging that on April 5, 2006, a radio personality at Station KHTB(FM) announced that he would play a prank by calling the Utah Poison Control Center to ask what would happen if pepper spray were to be swallowed.³ The complainant further alleges that the radio personality called the Utah Poison Control Center, spoke to a specialist without identifying himself or asking permission to air the telephone conversation, and that Station KHTB(FM) broadcast the telephone conversation.⁴

3. By Letters of Inquiry, the Enforcement Bureau directed 3 Point Media to provide information concerning the broadcast of this telephone conversation.⁵ In its Responses, 3 Point Media

¹ See 47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

² See 47 C.F.R. § 73.1206.

³ See Complaint filed on FCC Form 475B, received April 7, 2006 (“Complaint”).

⁴ *Id.*

⁵ See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to 3 Point Media – Salt Lake City, LLC, dated June 21, 2006 (“LOI”); Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to 3 Point Media – Salt Lake City, LLC, dated June 21, 2006 (“LOI”). (continued....)

admits that on April 6, 2006, Station KHTB(FM) aired a conversation between its employee, the radio personality named in the Complaint, and a Utah Poison Control Center operator without informing the operator that the telephone conversation would be recorded and broadcast.⁶ Specifically, 3 Point Media states that the radio personality made the call in anticipation of a station promotion in which one of the items to be given away was a can of pepper spray.⁷ 3 Point Media further states that the radio personality called the Utah Poison Control Center's hotline, selected the non-emergency option, and spoke with the operator about the potential dangers of using pepper spray as a practical joke.⁸ 3 Point Media also states that phone conversation was recorded, edited and aired only one time on April 6, 2006, but concedes that the actions of its employee in failing to inform the Utah Poison Control Center of his intention to record the call and/or broadcast such recording over the Station was "an error."⁹ Finally, 3 Point Media states that "no one in upper management at 3 Point [Media] authorized the telephone call" and that the call was "specifically violative of long-standing station policy."¹⁰

III. DISCUSSION

4. Section 73.1206 of the Commission's rules requires that,

Before recording a telephone conversation for broadcast, or broadcasting such conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.¹¹

Thus, under Section 73.1206, a licensee must generally notify a party to a telephone call of its intention to record the conversation for broadcast before it commences such recording. The rule reflects the Commission's longstanding policy that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoiding nonconsensual broadcasts of their conversations.¹² The Commission has held that the prior notification requirement ensures the protection

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Communications Commission, to 3 Point Media – Salt Lake City, LLC, dated August 24, 2006 ("Supplemental LOI").

⁶ See Letters from Bruce Buzil, Manager, 3 Point Media – Salt Lake City, LLC, to Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 16, 2006 ("Response") and September 5, 2006 ("Supplemental Response").

⁷ See Response at 1.

⁸ *Id.*

⁹ Response at 2; Supplemental Response at 1.

¹⁰ Response at 2.

¹¹ 47 C.F.R. § 73.1206.

¹² See *Amendment of Section 1206: Broadcast of Telephone Conversations*, MM Dkt. No. 85-37, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) ("1988 Order"); *Station-Initiated Telephone Calls Which Fail to Comply With Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972) ("1972 Public Notice"); *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Dkt. No. (continued....)

of an individual's "right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing.¹³ Furthermore, the Commission has emphasized that it expects strict adherence to Section 73.1206 notice requirements, particularly in situations in which broadcast stations engage in pranks or "practical jokes."¹⁴ 3 Point Media admits that it recorded and broadcast the telephone conversation between its employee and an operator for the Utah Poison Control Center on April 6, 2006, and that it did not inform the operator of its intent to do so.¹⁵

5. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.¹⁶ The term "willful" as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.¹⁷ Although 3 Point states that its employee acted in violation of station policy and without the knowledge of station management when he recorded the telephone conversation for broadcast without notifying the Utah Poison Control Center operator of his intention to do so, the Commission has consistently ruled that licensees are responsible for the selection and presentation of program material aired over their stations, as well as for the acts and omissions of their employees.¹⁸ Based on the evidence before us, we find that 3 Point Media apparently willfully violated Section 73.1206 of the Commission's Rules by failing to notify a party to a telephone conversation of its intent to record and broadcast their conversation.

6. Pursuant to the Commission's *Forfeiture Policy Statement*¹⁹ and Section 1.80 of the rules,²⁰ the base forfeiture amount for the unauthorized broadcast of a telephone conversation is \$4,000. The *Forfeiture Policy Statement* and Section 1.80 provide that a base forfeiture may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act and Section 1.80(a)(4) of

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18601, Report and Order, 23 FCC 2d 1, 2 (1970); *see also* *WXJD Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445 (Enf. Bur. 2004).

¹³ *1988 Order*, 3 FCC Rcd at 5463, ¶ 19.

¹⁴ *See 1972 Public Notice*, 35 FCC 2d at 940-41.

¹⁵ *See* Response at 2.

¹⁶ *See* 47 U.S.C. § 503(b).

¹⁷ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act" *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991).

¹⁸ *See, e.g., Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 23839, 23840-41, ¶5 (Inv. & Hearings Div., Enf. Bur. 2000), (*citing Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970); *Eleven Ten Broadcasting Corp.*, Decision, 32 FCC 706 (1962)).

¹⁹ *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17987, 17113 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

²⁰ 47 C.F.R. § 1.80.

the Commission's rules, which include "the nature, circumstances, extent, and gravity of the violation... and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²¹

7. Based upon our review of all the pertinent factors as required by Section 503(b)(2)(D) of the Act, we believe that a proposed forfeiture in the \$4,000 base amount is appropriate. This forfeiture amount has been proposed in other cases for similar violations of Section 73.1206.²² Thus, based upon the facts and circumstances presented here, and applying the *Forfeiture Policy Statement*, Section 1.80 and the statutory factors to this case, we conclude that 3 Point Media is apparently liable for a forfeiture in the amount of \$4,000 for violating Section 73.1206 of the Commission's rules.

IV. ORDERING CLAUSES

8. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules,²³ that 3 Point Media – Salt Lake City, LLC is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$4,000 for apparently willfully violating Section 73.1206 of the Commission's rules.

9. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release of this *NAL*, 3 Point Media – Salt Lake City, LLC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the appropriate *NAL*/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 35840, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229.

11. The response, if any, must be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554, and **MUST INCLUDE** the *NAL*/Acct. No. referenced above.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation specified.

13. Requests for full payment of the full amount of this *NAL* under an installment plan should

²¹ 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4).

²² See *Mid-Missouri Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 22900 (Enf. Bur. 2004) (Forfeiture Paid) (prank call to a gambling hotline counselor which was recorded and aired without required notice warranted a forfeiture of \$4,000); *Cumulus Licensing Corp.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 2753 (Enf. Bur. 2004) (Forfeiture Paid) (prank call to receptionist at competitor's station, which was recorded and aired without required notice warranted forfeiture of \$4,000).

²³ 47 C.F.R. § 1.80.

be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. For answers to questions, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov.²⁴

14. Accordingly, **IT IS ORDERED**, that the Complaint in this proceeding **IS GRANTED**, and the Complaint proceeding IS HEREBY TERMINATED.²⁵

15. **IT IS FURTHER ORDERED** that copies of this *NAL* shall be sent, by First Class Mail and Certified Mail to Mr. Bruce Buzil, Manager, 3 Point Media – Salt Lake City, LLC, 980 North Michigan Avenue, Suite 1880, Chicago, Illinois, 60611 and to its counsel, Aaron P. Shainis, Esquire, Shainis & Peltzman, Chartered, 1850 M Street, N.W., Suite 240, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau

²⁴ See 47 C.F.R. § 1.1914.

²⁵ Consistent with Section 503(b) of the Act and consistent with Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, 3 Point Media – Salt Lake City, LLC shall be the only party to this proceeding.